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No. 88-1468 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1989

DONALD V. JOHNSTONE, Petitioner,

v.

AMOCO OIL COMPANY, Respondent

ON WRIT OF CERTIORARI TO TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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April 6, 1989

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QUESTIONS RESTATED

1. Should the Petition be granted to review the holding of the Court of Appeals that the District Court correctly applied the doctrine of collateral estoppel where no new or different principles of collateral estoppel were applied or announced?

2. Should the Petition be granted to review an issue relating to the doctrine of collateral estoppel which was not raised in the District Court, was not raised in briefing or oral argument in the Court of Appeals, but was first raised in the Court of Appeals on rehearing?

3. Should the Petition be granted to review the holding of the Court of Appeals that the actual basis for the finding by the District Court in the prior case was necessary to the judgment entered by the District Court in the prior case, rather than some possible alternative basis not even considered?

STATEMENT REQUIRED BY RULE 28.1

Respondent Amoco Oil Company's parent corporations are Amoco Holding Company and Amoco Corporation. Amoco Oil Company's subsidiaries (excepting wholly-owned subsidiaries) and affiliates are Atlas Supply Company, Fertilizers of Trinidad & Tobago Limited, ACM Services, Inc. and Amoco International Finance Corporation.

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Respondent Amoco Oil Company ("Amoco") markets gasoline petroleum products. Amoco and petitioner Donald V. Johnstone ("Johnstone") were parties to a Lease, Dealer Supply Agreement and Meter Marketing Plan Rider ("MMP Rider") thereto, and other agreements relating to the Amoco Service Station located at 8601 Westfield Boulevard, Indianapolis, Indiana ("Nora Station") dated February 28, 1983. The term of the Lease and other agreements was from March 1, 1983 to February 28, 1986.

On October 11, 1984, Johnstone initiated an action against Amoco entitled "Donald V. Johnstone, plaintiffs v. Amoco Oil Company, defendant," in the United States District Court for the

Southern District of Indiana, Indianapolis Division, Cause No. IP 84-1518-C ("First Case"). In the First Case, Johnstone alleged that certain provisions in the MMP Riders to the dealer supply agreements between Johnstone and Amoco with respect to the Nora Station and another service station operated by Johnstone ("Belle Meade Station") violated the Indiana Deceptive Franchise Practices Act. Johnstone requested the Court to declare such provisions invalid and to reform each of the MMP Riders.

Amoco asserted that all issues concerning the validity of the MMP Rider for the Nora Station were Moot, because the franchise relationship between Amoco and Johnstone, which included the MMP Rider with respect to the Nora Station, had been terminated or non-renewed by

Amoco in accordance with the provisions of the Petroleum Marketing Practices Act, 15 U.S.C. §2801 et seq. ("PMPA"). On November 18, 1985, Amoco sent to Johnstone a notice terminating or non-renewing the Lease and any attendant franchise relationship between Amoco and Johnstone at the Nora Station effective February 28, 1986, the date of the expiration of the Lease and agreements. The notice included an offer to sell Johnstone Amoco's interest in the Nora Station and to assign to Johnstone Amoco's interest in the underlying ground lease.

On March 18, 1987, the District Court entered judgment in favor of Amoco and made the following pertinent findings of fact and conclusions of law:

Findings Of Fact

1. On February 28, 1983, Amoco Oil Company ("Amoco") and Donald V. Johnstone ("Johnstone") executed a Dealer Supply Agreement (DSA) and accompanying Meter Marketing Plan Rider (MMP) for each of two service stations.

2. One such station is located at 8601 Westfield Boulevard, Indianapolis, Indiana, S.S. No. 10071-46 ("Nora Station"). The DSA and MMP for the Nora Station expired pursuant to the terms of the agreements on February 28, 1986.

3. By letter dated November [18], 1985, Amoco gave Johnstone notice of its intention to terminate or nonrenew the parties' relationship with respect to the operation of the Nora Station in accordance with the provisions of the Petroleum Marketing Practices Act, 15 U.S.C. §2801 et seq.

* * *

Conclusions Of Law

1. All issues involving the validity of the provisions of the Meter Marketing Plan (MMP) Rider for the Nora Station are moot.

* * *

App., pp. 39a, 40a, and 44a.

The first action clearly involved an issue relating to the PMPA -- whether Amoco properly terminated its relationship with Johnstone with respect to the operation of the Nora Station in accordance with the provisions of the PMPA.

Johnstone's appeal of the Judgment in the First Case was dismissed on Johnstone's motion on May 21, 1987.

On May 19, 1986, Amoco filed this action (sometimes referred to as the "Second Case") against Johnstone seeking to eject Johnstone from the Nora Station. Johnstone filed a counter-claim in which he sought an order "declaring the Lease and other terms of the franchise relationship between the parties renewed as of March 1, 1986, under the same

terms and conditions set forth previously in writing between the parties . . .", based upon allegations that Amoco failed to properly terminate its relationship with Johnstone at the Nora Station pursuant to the PMPA.

The District Court correctly held in the Second Action that the doctrine of collateral estoppel precluded the relitigation of the issue of proper termination. Judgment in favor of Amoco was entered on November 9, 1987, and on September 14, 1988, the Seventh Circuit Court of Appeals affirmed.

REASONS FOR DENYING THE PETITION

I. SEVENTH CIRCUIT'S CORRECT APPLICATION OF DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT SHIFT BURDEN OF PROOF UNDER PMPA.

The issue presented to the Seventh Circuit Court of Appeals was whether the District Court properly applied the doctrine of collateral estoppel to preclude the relitigation of the issue of whether Amoco terminated its franchise relationship with Johnstone in accordance with the PMPA. The issue presented was not whether Amoco had the burden of proving proper termination in the First Case. Thus, the Seventh Circuit's Opinion is based upon principles relating to the doctrine of collateral estoppel, not the PMPA.

Johnstone's argument that the Seventh Circuit's Opinion shifts the burden of proving compliance with the

PMPA from the franchisor to the franchisee is nothing more than an attempt to manufacture a conflict among the circuits in construing the Act. The Seventh Circuit did not decide, nor does the decision even discuss or refer to, any issue relating to the burden of proof under the PMPA. The decision cannot be reasonably construed to have decided any issue on burden of proof or to conflict with any decision on the burden of proof.

The Seventh Circuit's Opinion does give the basis for its holding (on the issue which was presented on appeal) that the District Court correctly applied the doctrine of collateral estoppel.

Under the PMPA, a franchisor may terminate or nonrenew a franchise only

upon grounds specified in the Act and in accordance with the notice provisions of the Act. 15 U.S.C. §2802(a) and (b). Under 15 U.S.C. §2802(b)(3)(D)(i), a ground for nonrenewal is:

> (IV) that the renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee . . . .

Amoco terminated or non-renewed its relationship with Johnstone and gave notice of its intention to so termination or non-renew by letter dated November 18, 1985. Amoco's letter of November 18, 1985, stated:

> Please refer to your lease from this company, Form 26-342, dated February 28, 1983, covering the above identified service station premises such lease being identified therein as Lease No. B-20066-2.

> Amoco Oil Company does hereby terminate and nonrenew said Lease and does hereby terminate and nonrenew any attendant franchise relationship effective February 28, 1986. All agreements relating to the Lease and franchise relationship are also hereby terminated and nonrenewed as of said effective date.
>
> In compliance with the provisions of the Petroleum Marketing Practices Act you are hereby notified that the grounds for the above action are that Amoco Oil Company has evaluated the future profitability to Amoco of its franchise relationship with you using its standard and usual methods. Amoco Oil Company has made the determination in good faith and in the normal course of business that renewal of the franchise relationship is likely to be uneconomical to Amoco despite any reasonable changes or reasonable additions to provisions of the franchise which may be acceptable to the franchisee. . . .

Amoco's letter of November 18, 1985 also included an offer to sell Johnstone all of Amoco's interest in the Nora Station pursuant to the PMPA. 15 U.S.C. §2802(b)(3)(D)(iii)(I).

Amoco successfully asserted in the First Case that a judgment declaring a provision in the MMP Rider for the Nora Station as invalid under the Indiana Deceptive Franchise Practices Act would constitute the giving of an advisory opinion, because the relationship of the parties had been terminated in accordance with the PMPA. Because Amoco properly terminated or nonrenewed its relationship with Johnstone as of February 28, 1986, there was no longer an existing agreement subject to reformation. Thus, issues involving such rider were moot.

The Court's finding that Amoco "gave Johnstone notice of its intention to terminate or nonrenew the parties' relationship with respect to the operation of the Nora Station in

accordance with the provisions of the Petroleum Marketing Practices Act . . ." (emphasis added) and its conclusion that the issues involving the validity of the provisions of the MMP Rider for the Nora Station were moot necessarily were based upon the fact that Amoco's termination or nonrenewal was proper under the PMPA. If not properly terminated "in accordance with the provisions of the" PMPA, as found in the MMP Case, the relationship would not have been terminated and the issue would not have been moot!

The Seventh Circuit stated that at Johnstone's argument on appeal in the Second Case as follows:

> Johnstone argues that the application of collateral estoppel unjustly denies him the opportunity to dispute Amoco's stated grounds for non-renewal or termination, and the question of whether Amoco's offer to

> sell was bona fide. It is Johnstone's position that the District Court in the first case did not hear evidence, nor otherwise consider the merits of Amoco's compliance with the PMPA for the Nora Station. Johnstone also argues that the case cannot be construed to suggest such an adjudication.

App., pp. 10a-11a.

In rejecting Johnstone's argument, the Seventh Circuit quoted its decision in Frye v. United Steel Worker's of America, 767 F.2d 1216, 1222 (7th Cir.), cert. denied, 474 U.S. 1007 (1985):

> [e]ven if there were other facts that could have been presented at [trial] the fact that they were not brought to the [court's] attention would not argue against the application of collateral estoppel, as long as there had been an equal incentive to litigate the issue, and if there were no other factors making estoppel unjust.

App., p. 12a.

Applying its analysis in Frye, the Seventh Circuit held:

> It must be remembered that in the first suit between these parties Johnstone sued Amoco, seeking to reform certain aspects of their franchise arrangements. When the Nora Station lease expired by its own terms and bargaining in accordance with the PMPA produced no contract of sale, the Nora Station reverted to Amoco, and the controversy was over. Johnstone had no further legal interest in the Nora Station, and it would therefore be futile to try to reform a franchise that was no longer in existence. If Johnstone, as he claims, had valid defenses to any termination by Amoco the first case provided him with the time and place to offer those defenses. The issue of the Nora Station franchise's viability was put in issue by Amoco. The court then found the station's status had been resolved and all was moot. There was little more that Judge Dillin could say about the matter if the defendant held back and did not deny mootness nor offer any of the defenses he now claims to have had to demonstrate that the case was not moot because the PMPA had not been properly complied with by Amoco.

App., pp. 12a-13a.

The Court of Appeals' use of the term "defense"[1/] clearly was not referring to Affirmative Defenses as provided in Rule 8(c), Federal Rules of Civil Procedure, for which Johnstone would have the burden of proof. The term "defense" was plainly meant by the Court of Appeals to mean legal responses or arguments or evidence or reasons to oppose or to contest Amoco's contention. As in any action, a party responds to a contention of the party bearing the burden of proof by presenting evidence or legal arguments to attempt to defeat

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1/ The term "defense" may have been suggested to the Court by a section in Johnstone's Appellant's Brief entitled "Johnstone's Defenses and Claims Under the PMPA". Appellant's Brief, p. 15.

the contention or by challenging the sufficiency of the evidence to sustain the burden of proof. The Court of Appeals simply held that the place to challenge the sufficiency of the evidence of proper termination or challenge Amoco's claim of mootness was in the First Case where the issue was tried. Such an interpretation of the Opinion is clear based upon the context in which the term "defense" was used:

> It was up to Johnstone either to show why his claim was not moot or suffer the loss of that part of his own lawsuit as to the Nora Station. If he had for some reason been prevented from making his defense in that trial court he could have raised that issue on appeal. He did neither and voluntarily dismissed his appeal. We cannot now retry that part of Johnstone's first lawsuit in this second suit of Amoco. It appears that Johnstone may have mispreceived what was happening in the first suit and what its effect could be, but it should have been obvious. If Johnstone did not have the incentive to appeal the

> mootness issue vigorously in his own suit against Amoco, particularly when Amoco's suit against him was still pending, Amoco should not be penalized for Johnstone's lack of original incentive. The issue was critical both to his own case and in Amoco's case, cases that involved more than small or nominal damages. See Parklane Hosiery, 439 U.S. at 330. The incentive that now impels Johnstone to litigate the same issue with the same party comes too late . . . .
>
> In our view all of the requirements for the application of collateral estoppel were met. The issue of the propriety of the termination or nonrenewal of the lease already had been adequately resolved. There was nothing left for Judge Noland to do except enter judgment for Amoco, which he did, and which we must affirm.

App., pp. 13a-15a.

It is obvious, and undisputed, that Amoco asserted and had the burden of proving mootness and that mootness was dependent on proof that the relationship had been terminated or non-renewed in accordance with the PMPA. There is no

indication that the Court somehow felt Amoco did not have the burden of proof on this issue (which in any event would be an issue to be decided in the First Case). The Court of Appeals was talking about defending this contention on which Amoco had the burden of proof and whether Johnstone "held back" (App., p. 13a) or, in other words, failed to challenge or defend or contest this contention made by Amoco.

Nowhere in the Seventh Circuit's Opinion does the Court discuss or even allude to the burden of proof in actions under the PMPA. That fact is not surprising when it is considered that the argument to which the Court was responding was not who had the burden of proving compliance with the PMPA but rather Johnstone's argument that the

issue was not actually litigated in the First Case.

The Seventh Circuit's decision clearly does not conflict, nor could it be construed as conflicting, with the Eleventh Circuit's decision in Clinkscales v. Chevron U.S.A., Inc., 831 F.2d 1565 (11th Cir. 1987) or the Tenth Circuit's opinion in Ewing v. Amoco Oil Company, 823 F.2d 1432 (10th Cir. 1987).

Contrary to Johnstone's assertion, the Seventh Circuit's decision does not "set a confusing precedent". The decision is clear. The Seventh Circuit held that Johnstone should have raised his argument concerning the insufficiency of the evidence to support the finding of proper termination in the First Case.

Moreover, the burden of proof on the issue of proper termination under the PMPA did not shift from Amoco to Johnstone. Amoco clearly asserted the issue of proper termination in the First Case as a defense to Johnstone's request for reformation of the MMP Rider. Amoco assumed the burden of proving proper termination in the First Case, and the District Court found that Amoco met its burden. Again, Johnstone's contention that Amoco failed to meet its burden of proof by presenting evidence sufficient to establish the propriety of Amoco's termination or nonrenewal of Johnstone under the PMPA should have been asserted in Johnstone's appeal of the First Case. The application of collateral estoppel cannot be defeated by a claim of insufficient evidence:

> The requirement of collateral estoppel that the issue be 'actually litigated' does not require the issue be thoroughly litigated. Collateral estoppel may apply 'no matter how slight was the evidence on which a determination was made, in the first suit, of the issue to be concluded.' [citations omitted]. This requirement is generally satisfied if the parties to the original action disputed the issue and the trier of fact resolved it [citations omitted]. Under this standard, the issue in the present case was actually litigated despite the imbalance in the quantity of the evidence introduced [footnote omitted]. Any other result would permit a litigant to avoid the conclusive effect of collateral estoppel, by design or by inadvertence, by denoting as irrelevant an issue clearly raised by his oponent and by refusing to introduce evidence on the issue.

Continental Can Co. v. Marshall, 603 F.2d 590, 596 (7th Cir. 1979).

Having lost the First Case and now realizing that the result effected an important issue in this case, Johnstone is in effect saying that he simply did

not foresee that the findings and conclusions in the First Case could have preclusive effect in the Second Case and that, if he had, he would have more vigorously litigated the PMPA issues in the First Case. Any party against whom issue preclusion is applied could make precisely the same claim. As discussed by the Court in Continental Can:

> [W]henever a court considers applying the doctrine of collateral estoppel, there is always a lingering question whether the party might have succeeded in proving his point if he had only been given a second chance at producing evidence. Without more, however, this question is not sufficient to outweigh the extremely important policy underlying the doctrine of collateral estoppel -- that litigation of issues at some point must come to an end.

Id. at 596, n. 8, quoting, James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451, 463 (5th Cir. 1971).

Johnstone is in the wrong case at the wrong time seeing with 20/20 hindsight things he wish he had done in the First Case which he thinks might have produced a different result.

The Seventh Circuit's Opinion is clearly correct and provides no basis for the granting of Johnstone's Petition to this Court.

II. SECTION 2805(E) ARGUMENT WAIVED.

In his Petition for Rehearing in the Court of Appeals, Johnstone for the first time argued and now argues here that the Court could not mandate the continuation of the franchise relationship under §2805(e), if Amoco established that the renewal was likely to be uneconomical dispite any reasonable changes or additions to the franchise

and compliance with the PMPA notice provisions.

This issue was first raised by Johnstone in his Petition for Rehearing filed with the Court of Appeals in this case. Johnstone did not raise the issue in his pleadings, briefs, or in the trial of this case. In fact, Johnstone's present position is a complete reversal of the positions he took in his pleadings and at trial. In his counter-claim, Johnstone sought an order "declaring the Lease and other terms of the franchise relationship between the parties renewed as of March 1, 1986, under the same terms and conditions set forth previously in writing between the parties. . . ."

Nor did Johnstone raise the issue in his brief, reply brief, or oral argument in the Court of Appeals.

The issues argued by Johnstone in the Court of Appeals were summarized in his Brief's "SUMMARY CONCLUSION" (pp. 20-21):

> 1. The PMPA compliance issues were not actually or impliedly litigated or decided on the merits in the course of the MMP case;
>
> 2. The resolution of the PMPA compliance issues were totally unnecessary to the District Court's judgment in the MMP case; [Johnstone argued that because the Court ruled against him on the Belle Meade Station MMP Rider which had the same wording as the Nora MMP Rider, the ruling on Nora was "entirely superfluous!". Appellant's Brief in Court of Appeals, p. 19. Amoco urged that significant factual differences between Belle Meade and Nora showed that the District Court would not necessarily have reached the same result on the Nora MMP Rider.]
>
> 3. There was no incentive for the parties to litigate the PMPA compliance issues during the course of the MMP case, and, indeed, Johnstone could not reasonably have foreseen that the PMPA compliance issues would even been considered with the context of the MMP case; and

4. Preclusion of the PMPA compliance issues in the course of this case is grossly unfair to Johnstone and contrary to the purposes of the collateral estoppel doctrine.

Although Johnstone now seems ready to concede that Amoco terminated the relationship on proper grounds in making his argument based upon §2805(e), he argued the contrary to the Seventh Circuit: "No finding of fact was made with regard to any factual issue necessary to determine if the notice of termination or nonrenewal was upon proper grounds or whether Amoco's offer to sell its interest in the premises to Johnstone was a 'bona fide offer' as required by the PMPA." Appellant's Brief in Court of Appeals, p. 18.

Because the issue was not raised by Johnstone before the District Court or

even in the Court of Appeals, prior to the issuance of the Opinion, any argument based on §2805(e) has been waived. E.E.O.C. v. Federal Labor Relations Authority, 476 U.S. 19, 24, (1986); Hoover v. Ronwin, 466 U.S. 558, 574, n. 25 (1984).

The Opinion of the Court of Appeals does not raise, discuss or decide any PMPA issues. There is no reason for this Court to depart from its general rule of refusing to decide questions raised for the first time on appeal. See, e.g., Carlson v. Green, 446 U.S. 14, 17, n. 2 (1980).

III. SECTION 2805(e) NOT BASIS OF DECISION.

Even if Johnstone had not waived the argument, the new argument under §2805(e) would not have changed the result reached by the Court of Appeals.

That the District Court might have decided the issues in the First Case on some other basis, such as §2805(e), does not mean the actual basis for the ruling (mootness because the relationship had been terminated or non-renewed in accordance with the PMPA) was unnecessary and dictum.

The requirement of necessity means that the "disposition in the first suit was the basis for the holding with respect to the issue and not 'mere dictum.'" McLaughlin v. Bradlee, 803 F.2d 1197, 1204 (D.C. Cir. 1987). As was stated by the McLaughlin Court:

> In this case, the application of the necessity criterion 'involve[s] nothing more than a straightforward inquiry whether a particular issue was merely incidental to the first judgment.'

Id.

The District Court in the First Case expressly held that the parties' relationship had been terminated in accordance with the PMPA. The finding necessarily included a finding that Amoco complied with 15 U.S.C. §2802(b)(3)(D), including a finding that Amoco made a bona fide offer to sell its interest in the Nora Station to Johnstone. The basis for the District Court's finding and the argument presented by Amoco was that Amoco complied with 15 U.S.C. §2802(b)(3)(D). Amoco did not argue and the Court did not hold that the issues relating to the Nora Station were moot based upon an application of §2805(e).

Application of §2805(e) depends upon a finding that the relationship had not

been properly terminated[2/] and then denies equitable relief because of the provisions of §2805(e). Thus, application of §2805(e) would have required a finding in the First Case that the relationship had not been properly terminated in accordance with the PMPA. This is exactly what the Court did not find in the First (MMP) Case.

Johnstone's argument is similar to the argument that, if a case is decided on alternative grounds, preclusive effect cannot be given to one of the alternatives, because it was not necessary to the decision. Such an argument is routinely rejected by the courts. Ezagui v. Dow Chemical Corp.,

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2/ Based on §2805(e), Johnstone now argues that he "may still seek actual damages" based on an improper termination. Pet. p. 39; also see pp. 40 and 42 ¶ (c).

598 F.2d 727, 732-33 (2nd Cir. 1979); General Dynamics Corp. v. American Tel. and Tel. Co., 650 F. Supp. 1274, 1284-85 (N.D. Ill. 1986). As was stated by the Court in Ezagui: "Even 'if a court decides a case on two grounds, each is a good estoppel.'" 598 F.2d at 727, quoting, Irving National Bank v. Law, 10 F.2d 721, 724 (2nd Cir. 1926).

A simple illustration of the principle is as follows. In a routine negligence case, the Court could decide for defendant based on findings of contributory negligence, absence of negligence of defendant, or plaintiff's failure to establish proximate causation. If the Court makes specific findings of fact in favor of defendant on each of the issues, each issue is necessary to the judgment and has preclusive effect.

Further, if the Court, in fact, rules against plaintiff on the issue of contributory negligence, but declines to rule on negligence and proximate causation, the basis for the decision is that ruling, which is, accordingly, necessary. The fact that the Court might have reached the same conclusion on different grounds, e.g., no proximate cause or no negligence on the part of defendant, does not render a finding of contributory negligence unnecessary.

The basis for the District Court's decision in the First Case was that Amoco terminated or non-renewed the parties' relationship in accordance with the PMPA. Hence, the District Court did not need to and did not in fact consider §2805(e).

Johnstone's argument that "the MMP case did not involve any claims under the PMPA" (Pet., p. 42) is manifestly incorrect: Amoco asserted in the First (MMP) Case that the MMP issues were moot because the relationship had been terminated and non-renewed in accordance with the PMPA.

There are many ways in which a court can decide any case. Collateral estoppel is based upon the findings necessary to the manner in which the Court, in fact, decided the case. Collateral estoppel is not based upon some hypothetical, possible alternative that long after the fact a party argues as another possible basis for reaching the same result.

Section 2805(e) provides no basis for the granting of Johnstone's Petition.

CONCLUSION

This is an issue preclusion case, not a PMPA case!

Johnstone incorrectly attempts to wrench this case into a PMPA decision. However, the decision that the relationship between Johnstone and Amoco had been terminated in accordance with the PMPA was made in the First Case. Johnstone had his opportunity and was required to litigate those issues there. The District Court and the Court of Appeals properly applied collateral estoppel to preclude relitigation of those issues in this case.

The Court of Appeals did not discuss or decide any issues of burden proof under the PMPA. The Court decided collateral estoppel issues. Hence the purported conflict in the circuits urged by Johnstone does not exist.

The Petition has failed to show any reasons why this Court should review any aspect of the decision. The Petition for Certiorari should be denied.

Dated: April 6, 1989.

Respectfully submitted,

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